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THE HONORABLE KATHLEEN M. O'CONNOR

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SPOKANE COUNTY

MARCO BARBANTI, individually and on behalf of a class of all others similarly situated,

Plaintiffs,

v.

W.R. GRACE & COMPANY-CONN (a Connecticut corporation); W.R. GRACE & COMPANY (a Delaware corporation); W.R. GRACE & CO., aka GRACE, an association of business entities; SEALED AIR CORPORATION (a Delaware corporation); and WILLIAM V. CULVER, a resident of the state of Washington,

Defendants.

NO. 00201756-6

GRACE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (MOTION 2)

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I. INTRODUCTION

Plaintiff Marco Barbanti, a residential and commercial landlord purporting to act on behalf of a class of individual Washington State homeowners, seeks an unprecedented mandatory injunction. Plaintiff asks this Court to compel defendant W.R. Grace & Co.-Conn. (collectively, with the other defendants, "Grace") to fund the issuance of an "emergency notice" containing a warning regarding Zonolite Attic Insulation ("ZAI"), to be published in Washington State Sunday newspapers. As Grace describes below, no court has issued a preliminary injunction requiring a warning under circumstances like those presented here. Nothing about this case justifies such an extraordinary and unprecedented order. Here:

- The evidence of any health risk to the public is minimal or nonexistent. The material, which is not even classified as asbestos-containing under Environmental Protection Agency ("EPA") regulations, poses no significant risk to homeowners—not in place, or even if occasionally disturbed during maintenance and remodeling. Declaration of Dr. Morton Corn, dated September 11, 2000 ("Corn Dec."), (Ex. 2 to Declaration of Rocco N. Treppiedi Regarding Defendants' Response to Plaintiff's Motion For Preliminary Injunction dated October 6, 2000) ("Oct. 6 Treppiedi Dec."), ¶¶ 24-26. There is simply no hazard requiring a warning, and certainly no emergency requiring an alarm crafted and distributed on a preliminary basis. See Affidavit of Bertram Price dated September 5, 2000 ("Price Aff.") (Ex. 5 to Oct. 6 Treppiedi Dec.), p. 22. Indeed, the presence of trace amounts of asbestos in ZAI

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has been known to regulators for over 20 years. For example, an exposure assessment published by the EPA in 1985 concludes that "[o]nce in place, vermiculite attic insulation would probably not lead to subsequent consumer exposure. The type of attic in which vermiculite is used is ordinarily isolated from the rest of the home and is not regularly entered." Price Aff., p. 9. The EPA's current web page concludes: "[D]ue to the physical characteristics of vermiculite, there's a low potential the material is getting into the air. If the insulation is not exposed to the home environment—for example, it's sealed behind wallboards and floorboards or is isolated in the attic which is vented outside—the best advice would be to leave it alone." EPA Region 1 website: "Q&A Regarding Vermiculite Insulation" (Ex. 17 to Oct. 6 Treppiedi Dec.).

- Plaintiff's own actions, including his failure to give his own tenants any warning about ZAI until months after seeking an "emergency notice" from this Court, show he does not genuinely believe a real emergency to exist here. Indeed, plaintiff's counsel admitted at the hearing on plaintiff's class certification motion that he did not "want to exaggerate by calling [the alleged public health concern posed by vermiculite] an emergency necessarily." Transcript of September 21, 2000 hearing ("Sept. 21 Trans."), p. 24:1-2 (Ex. 16 to Oct. 6 Treppiedi Dec.).
- The public—particularly in the state of Washington—has already been well informed about any alleged risks associated with vermiculite insulation. The EPA has noted: *"A tremendous amount of information*

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[about asbestos contamination in vermiculite] has been made available to the public via print, television/radio and the internet." EPA Asbestos Home Page, www.epa.gov/opptintr/asbestos/verm.htm (Ex. 18 to Oct. 6 Treppiedi Dec.) (emphasis added). The EPA itself has addressed the issue in press releases and its website. A court-ordered warning will add nothing meaningful to the information available to the public and will detract from regulatory agencies' guidance on the issue.

- A host of regulatory agencies and authorities are in the midst of studying vermiculite products. Among these are the EPA, the Agency for Toxic Substances and Disease Registry ("ATSDR"), the Occupational Safety and Health Administration ("OSHA"), the Consumer Product Safety Commission ("CPSC"), and the Washington State local air quality control authorities. These agencies have jurisdiction over, and expertise in evaluating, any risks associated with vermiculite. None has declared a need for a warning of the type proposed by plaintiff. By compelling a warning on a preliminary basis, this Court would usurp the authority vested in these agencies to make the required scientific assessments and corresponding public policy determinations. It would further risk setting policy that is inconsistent with the determinations of the regulatory authorities. Indeed, plaintiff's own medical expert, Dr. Henry A. Anderson, Wisconsin's Chief Medical Officer for Occupational and Environmental Health, is awaiting EPA's leadership before taking any proactive steps in his state because, in his opinion, "it has to be national . . . the lead and the announcements will

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come via ATSDR and EPA." Deposition of Dr. Henry A. Anderson ("Anderson Dep.") (Ex. 7 to Oct. 6 Treppiedi Dec.), p. 143:2-3.

- Plaintiff has no statutory or legal authority for the relief he seeks. Injunctive relief is not available under the Washington Consumer Protection Act, RCW 19.86.010 et seq. (the "CPA"). The CPA permits injunctions only to address "further violations" of the act. Since Grace has not manufactured ZAI for over 15 years, there can be no injunction applicable to Grace's conduct. The CPA does not impose a duty to consumers that postdates the sale of a product. Furthermore, no such ongoing duty could impose CPA liability here, where the alleged consequences of its breach would be personal injuries—which are not cognizable under the CPA. Finally, plaintiff himself has no claim under the CPA, as he admits he never relied on any affirmative statement or representation of Grace in connection with ZAI and thus cannot establish the crucial element of causation. Nor is injunctive relief available under the Washington State Product Liability Act, RCW 7.72.010 et seq. (the "WPLA"), because the only relief allowed under the WPLA is damages.

Under these circumstances, plaintiff falls far short of showing the "clear legal ... right" required for even an ordinary prohibitory injunction, Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wn.2d 785, 792 (1982) (citation omitted), and even farther from showing entitlement to the extraordinary mandatory injunction sought here. See State ex rel. Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 532 (1940). Because the current scientific record shows that there is *no* hazard to

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homeowners from existing ZAI, plaintiff can establish neither a probability of success on the merits nor anything more than a speculative harm. Equitable factors do not support an injunction because the unsupported "warning" plaintiff seeks would cause consumer confusion, harm the public interest, and damage Grace's business and reputation.

II. FACTUAL BACKGROUND

A. ZONOLITE ATTIC INSULATION

The product at issue is Grace's Zonolite Attic Insulation. ZAI, which was made of an expanded mineral known as vermiculite, was used for decades. ZAI offered consumers an easy-to-apply, loose-fill insulation product that could significantly increase the insulation value in a home. The product was used in a variety of different attic applications—poured into the spaces between the joists of the attic floor, added as a supplemental insulation in areas where fiberglass and other sheet insulation could not reach, or used on top of or underneath fiberglass or mineral wool insulation to provide an additional insulation layer. In many cases, it was covered with a layer of plywood, lumber, or wood composite. Over the years, ZAI has saved Washington State homeowners millions of dollars in energy costs. Grace ceased selling ZAI in 1984.

B. TRACE OR NEGLIGIBLE AMOUNTS OF ASBESTOS IN ZONOLITE ATTIC INSULATION

Grace never added asbestos to ZAI. Vermiculite itself is not asbestos. However, the vermiculite ore Grace extracted from its Libby, Montana, vermiculite mine contained small amounts of tremolite asbestos. Most of this was eliminated as the vermiculite was milled at the mine. The product that was shipped from the mines

to the expanding plants was called vermiculite concentrate. At the expanding plants, the concentrate was processed through high temperature furnaces where the heat caused the vermiculite to expand. During the expansion process, virtually all the remaining amounts of asbestos were eliminated so that in the final expanded product, the presence of asbestos in vermiculite was negligible. Plaintiff's own expert, Donald Hurst, acknowledged that his testing showed that the ZAI from Spokane homes contained less than 1/10 of 1% by weight of asbestos, and that neither federal nor state agencies would define the ZAI vermiculite as an asbestos-containing product.[1]

C. ASBESTOS

All people living in urban areas have many asbestos fibers in their lungs simply by living in that environment, yet there is no evidence that consistently breathing ubiquitous environmental levels of asbestos over an entire lifetime causes any increased incidence of asbestos-related disease. Declaration of William G. Hughson, M.D., Ph.D., dated September 7, 2000 (Ex. 3 to Oct. 6 Treppiedi Dec.), ¶ 8. Although all who live in urban areas are exposed to low levels of asbestos, there has obviously been no widespread epidemic of asbestos-related disease from this exposure. It is only when respirable fibers are somehow released from an asbestos-containing building material in sufficient quantities over a sufficient period of time

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[1] Plaintiff has attempted to "poison the well" by repeatedly mischaracterizing Grace's historical acts in making and selling ZAI even though the history of what Grace knew, and when, is not relevant to whether an injunction should be issued. As such, Grace need not and will not respond to those mischaracterizations here, although at the appropriate time they will be fiercely contested.

that a potential health risk can arise. Id. ¶ 5. Not every exposure to asbestos results in disease. Id. Whether a person is at increased risk from exposure to asbestos, including exposures from asbestos-containing materials in buildings, depends on the level of exposure (dose), the type of asbestos fibers, and the size of the fibers. Id. There are levels of asbestos exposure below which disease has not been shown to occur. Id. This is true for asbestosis, lung cancer, and mesothelioma. Id.

In order to contract an asbestos-related disease, an individual must have a significant, cumulative lifetime exposure to asbestos that is not possible from ZAI, given the extremely low and often nonexistent levels of asbestos in the breathable air of homes insulated with it. As the EPA itself has noted, "[A]t very low exposure levels, the risk may be negligible or zero." Price Aff., p. 13 (quoting testimony of Linda Fisher of EPA, before House Subcommittee on Education and Labor, April 3, 1990).

D. THE ABSENCE OF AN EMERGENCY

No credible evidence suggests that the mere presence of asbestos in buildings, or even the presence of materials containing 10-20% asbestos as an added ingredient, creates a hazard. The EPA has specifically addressed the subject in Managing Asbestos in Place, its most recent guidance document on the asbestos-in-buildings issue. That publication succinctly summarizes the EPA's policy on asbestos in buildings with respect to products containing more than 10 times as much asbestos as ZAI. The EPA's book notes: "The average airborne asbestos levels in buildings seems to be very low . . . the health risk to most occupants appears to be very low." Price Aff., p. 13 (quoting Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs for Asbestos-Containing Materials, EPA 20T-

2003, July 1990). Decades of air monitoring in buildings containing asbestos materials have shown that there are no more asbestos fibers in the air inside buildings than in the outside air. Corn Dec. 18.

Nothing suggests that the situation is at all different for ZAI—indeed the extremely low trace amounts of asbestos in the product make this teaching even more significant. Even plaintiff's own expert acknowledges that undisturbed vermiculite poses no risk. See Anderson Dep., pp. 47, 55-56 ("critical factor is not how much [asbestos fiber] is there, but how much you can stir up," because "that's how fibers become airborne and get up into the breathing zone").

There is accordingly no heightened risk that any resident in a building containing ZAI will suffer from an asbestos-containing disease. Dr. Morton Corn, former head of OSHA and a renowned expert in industrial hygiene, inspected the houses of putative class members that were made available by plaintiff's counsel, and concluded that "the vermiculite attic insulation present within the homes does not pose an increased or significant risk to the health of the occupants[.]" Corn Dec. ¶ 22. Furthermore, it is Dr. Corn's opinion that "there is an insignificant probability that exposure to airborne fibers would occur." Id. ¶ 23.[2] In fact, in the laboratory analysis of air samples collected from seven plaintiffs' homes that were inspected by the

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[2] While plaintiff cites Harashe v. Flintkote Co., 848 S.W.2d 506 (Mo. Ct. App. 1993), as an alleged incident of disease from exposure to ZAI, Mr. Harashe was a laborer for many years who had a history of extensive exposure to other asbestos-containing products such as pipe and boiler insulation. See Anderson Dep., pp. 117-18 (acknowledging Mr. Harashe's exposure to asbestos pipe and boiler insulation).

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parties, there were no amphibole[3] asbestos fibers, of any size, observed in the analysis. Affidavit of Richard L. Lee dated September 18, 2000 ("Lee Aff.") (Ex. 4 to Oct. 6 Treppiedi Dec.), ¶ 18.

Plaintiff argues that "maintenance, repair, and remodeling" in homes with ZAI could somehow put vermiculite homeowners at risk and that a warning in a Sunday newspaper will somehow correct the purported problem. But even plaintiff's own test results—when appropriately adjusted for any time-weighted exposures and using appropriate direct analytical technologies that count only asbestos fibers—generally show levels within the OSHA limits. Lee Aff. ¶ 21. The only possible exception to this was the alleged 70-minute simulation involving shoveling out of insulation in the attic—by definition, a once-in-a-lifetime activity. This activity will not create a significant risk unless an individual was exposed to such levels for a continual period, which is unrealistic. In Dr. Corn's opinion, even if such activities were undertaken without protection, "such intermittent exposure during the attic remodeling or renovations would not have any health significance." Corn Dec. ¶ 23.

Deposition testimony has also made clear that residents simply do not disturb ZAI except in rare and extraordinary circumstances. For example, Mr. Matthews, a former carpenter, has never conducted any renovation in his home and plans to do none. Deposition of Ernest H. Matthews, dated August 22, 2000 ("Matthews Dep.") (Ex. 14 to Oct. 6 Treppiedi Dec.), pp. 6:18-7:25, 48:13-16 . Neither has Ms. Thurman. Deposition of Rosemarie E. Thurman, dated August 21, 2000

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[3] This is the type of asbestos sometimes found in vermiculite from the Libby mine.

("Thurman Dep.") (Ex. 15 to Oct. 6 Treppiedi Dec.), at p. 52:14-17. Mr. Hatch, who already has conducted work in his attic, was already taking steps to protect himself from dust as part of ordinary dust protection activities. Deposition of Rand T. Hatch, dated August 21, 2000 ("Hatch Dep.") (Ex. 11 to Oct. 6 Treppiedi Dec.), pp. 39:16-41:8. Mr. Barbanti has never even been in his own attic and does not even know if it contains vermiculite. Deposition of Marco Barbanti, dated August 17, 2000 ("Barbanti Dep.") (Ex. 8 to Oct. 6 Treppiedi Dec.), p. 211:2-10.

Mr. Barbanti himself clearly does not believe there is a significant risk. Although he comes to this Court claiming there is an emergency and an "immediate, present, and ongoing threat," his actions speak more eloquently about his true beliefs. Mr. Barbanti owns some 50 or so properties, but he has inspected no more than seven to see if they contain the material. Id. at pp. 7:23-8:2, 11:1-3, 216:15-223:1, 223:12-224:7. He has not even inspected his own residence to see if it has ZAI, although he has lived there for 20 years. Id. at pp. 13:7, 211:2-10, 217:14-17. He has not inspected any of these homes for other asbestos-containing materials, although he knows such products were widely used. Although he is seeking an urgent notice to all homeowners about the vermiculite issue, he did not provide such a notice to those residing in his buildings until he was prompted to do so by the interrogatories Grace served on him in this case. Id. at pp. 184:19-187:2. Ironically, Mr. Barbanti himself did not provide a warning to his own tenants until months after he came to this Court seeking an "emergency notice." Barbanti Dep., pp. 175:18-24, 186:4-187:2.

There is thus no credible scientific evidence that the risk to a homeowner from ZAI is significant or that ZAI should somehow be singled out from the host of allegedly hazardous materials in a home—fiberglass, radon, exposed electrical wires,

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asbestos-containing duct wrap, floor tile, or drywall—for a special one-time warning issued on a preliminary basis.

Indeed, despite plaintiff's claim that there is an emergency or imminent health hazard, the actions of his own counsel show there is no need for urgent action. Mr. Barbanti is represented by counsel who have litigated asbestos cases against W.R. Grace for over 15 years. These experienced lawyers have themselves been aware of the presence of trace levels of asbestos in vermiculite products *for decades*. They have argued as early as 1993 that the trace elements of asbestos in vermiculite are a hazard. Documents they have submitted in an effort to establish a need for an emergency preliminary injunction have been part of asbestos property damage litigation since the early 1980s. See Plaintiff's Exs. 1-4; 9-15; 17-18. Their own experts' testing dates back to at least 1993. See Ex. 18 to the Declaration of Richard Hatfield submitted by plaintiff. They rely on EPA documentation covering the issue of asbestos and vermiculite going back as far as 1985. See Ex. A to Declaration of Christi L. Bergound in Support of Motion for Class Certification (submitted by plaintiff). Dr. John Dement, who has been testifying for plaintiff's counsel for years and on whom plaintiff ironically now relies in support of his contention that an emergency exists here, testified years ago regarding asbestos in vermiculite and its alleged hazard. See Deposition of John McCray Dement, Ph.D. dated August 31, 2000 (Ex. 10 to Oct. 6 Treppiedi Dec.), pp. 143:5-144:19. With all this material in their possession for years, plaintiff's counsel have done nothing about this supposed risk. Their delay in acting until now suggests that they themselves were for years indifferent to any perceived risk or, more likely, that this alleged "emergency" is a creature of their own invention. Indeed, plaintiff's counsel admitted during oral

argument of the class certification motion that an emergency does not exist. While discussing the alleged public health problem plaintiff contends is posed by vermiculite, counsel expressly stated that "I don't want to exaggerate it by calling it an emergency necessarily." Sept. 21 Trans., p 24:1-2, (Ex. 16 to Oct 6 Treppiedi Dec.).

E. MEDIA ATTENTION

In the meantime, however, the issue of asbestos and vermiculite has received widespread publicity in Washington State. Both over the years and in the last six months, the print and electronic media have repeatedly carried stories about asbestos in construction products, about tremolite in Grace's vermiculite mined at Libby, and indeed about tremolite in ZAI. There have been numerous high-profile articles on asbestos and vermiculite products, including attic insulation, published in the state. Articles have appeared in the major newspapers (The Seattle Times, Seattle Post-Intelligencer, The Spokesman-Review) as well as television and radio news media, and have been disseminated even more widely via the wire services and the Internet. Affidavit of Margaret C. Brown ("Brown Aff.") (Ex. 1 to Oct. 6 Treppiedi Dec.), ¶¶ 8-11. The Seattle Post-Intelligencer has aggressively covered asbestos in general, and vermiculite products in particular, including two ongoing series of special reports, which comprises in excess of 40 articles to date. Id. ¶ 9. This coverage, as well as more than 40 articles in The Spokesman-Review, has focused on the Libby mine and ZAI. Id. ¶¶ 9, 11. In addition, action by public agencies, such as the EPA, has received widespread media attention, and the agencies have engaged in extensive public communications efforts of their own. Brown Aff. ¶ 13; Price Aff. § 4.1. As the EPA itself noted in its website, "A tremendous amount of information has been made available to the public via print, television/radio and the internet." EPA

Asbestos Home Page (Ex. 18 to Oct. 6 Treppiedi Dec.). Notably, both plaintiff and those who submitted affidavits on plaintiff's behalf were aware of the presence of small amounts of asbestos in ZAI through media publicity. See Matthews Dep., pp. 14:23-15:12, 21:6-22:20; Thurman Dep., pp. 4:24-5:20, 23:18-23; Hatch Dep., pp. 4:18-6:3; Deposition of Brendan J. King, dated August 18, 2000 (Ex. 13 to Oct. 6 Treppiedi Dec.), pp. 4:4-6:4, 43:23-45:25, 50:23-51:2; Barbanti Dep., pp. 4:11-23, 23:12-24:7; Deposition of Ralph E. Busch, dated August 22, 2000 (Ex. 9 to Oct. 6 Treppiedi Dec.), pp. 4:20-5:11, 13:19-18:7. Indeed, plaintiff and each affiant testified that as a result of the media publicity, they took action, including contacting plaintiff's counsel, ceasing renovations, and sealing up attics. Thurman Dep. p. 42:5-17; Busch Dep. p. 19:6-14; King Dep. pp. 28:22-29:10; Hatch Dep. pp. 58:20-59:5; Matthews Dep. p. 47:22-25; Barbanti Dep. pp. 4:11-5:8.

Plaintiff is decidedly unclear about what any warning will accomplish. The warning that plaintiff seeks to have this Court issue has been drafted not by an expert in warnings or human factors, but by a former public relations executive who now makes a living providing class notifications. Deposition of Todd Bruce Hilsee dated August 8, 2000 ("Hilsee Dep.") (Ex. 12 to Oct. 6 Treppiedi Dec.), pp. 6:6-14, 8:6-20; 20:10-17. He proposes to be paid an hourly rate plus a commission on all advertising costs associated with publicizing any warning. Id. pp. 30:10-31:7. In other words, the more often the warning is given, the more he is paid. He has no information regarding whether those who will receive the warning will respond, whether any warning will be heeded, or whether the type of warning proposed is calculated to reach those plaintiff asserts need to be warned. Id. pp. 10:2-11:17, 29:5-16, 96:19-98:20, 119:22-120:4.

III. ARGUMENT

A. PLAINTIFF CANNOT MEET HIS HEAVY BURDEN FOR OBTAINING THE EXTRAORDINARY MANDATORY INJUNCTION REQUESTED.

1. Plaintiff's Request Is Unprecedented and Improperly Asks This Court to Prejudge a Material Issue in This Case.

Plaintiff's request in this case is not only for a mandatory injunction, but for one that is unique and unprecedented. Plaintiff seeks a statewide "warning" to be issued, before a trial on the merits, that ZAI is a potential health hazard to homeowners. This is the very issue that plaintiff must prove at trial. Contrary to plaintiff's assertion, courts have consistently denied preliminary injunctions seeking the affirmative issuance of warnings before a trial to determine whether a hazard even exists.

In Punnett v. Carter, 621 F.2d 578 (3d Cir. 1980) ("Punnett I"), the Third Circuit rejected the plaintiffs' request for an injunction similar to that sought here. Plaintiffs, veterans of United States Army atomic tests, sought a preliminary injunction to compel a public warning that children born to test participants might bear higher risks of mutagenic defects. There, as here, the court was "presented not merely with a motion for an injunction to preserve the status quo *pendente lite* but with a request for a mandatory injunction *that would have the effect of granting a substantial portion of the relief sought in the plaintiffs' complaint.*" Id. at 583 (emphasis added). The court noted that—as in this case—it was not to decide at this stage whether a hazard existed. Id. at 582. Plaintiffs failed to "establish[] with any certainty" the existence of a hazard or any risk that resulted from it. Id. at 586.

Accordingly, the court concluded that plaintiffs had not met the "heavy burden" required of them, and denial of the injunction was appropriate. Id. at 588.

Similarly, in Sanborn Mfg. Co. v. Campbell-Hausfeld/Scott Fetzer Co., 997 F.2d 484, 489-90 (8th Cir. 1993), the court in a deceptive trade practices suit rejected a mandatory preliminary injunction that would have required the defendant to notify consumers that it had falsely labeled its products. According to the court, "[r]equiring [defendant] to take affirmative action such as sending a notice to all of its customers indicating that it ha[d] falsely labeled its products before that issue has been decided on the merits goes beyond the purpose of a *preliminary* injunction." Id. at 490. There, as here, a preliminary injunction was improper because the court was being asked to decide the parties' rights before a trial on the merits.[4]

In Churchill Village, L.L.C. v. General Elec. Co., 2000 U.S. Dist. LEXIS 7505 (N.D. Cal. May 10, 2000), plaintiffs sought to compel G.E. to issue a corrective disclosure regarding a safety defect in certain types of dishwashers, asserting that G.E.'s prior notices were misleading and incomplete. The court denied the request, stating that plaintiffs' "already substantial burden" in obtaining a preliminary injunction "is subject to 'heightened scrutiny' where, as here, a court is asked to order a defendant to engage in certain affirmative conduct." Id. at *9 (citation omitted).

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[4] The district court also had denied the preliminary injunction in part on the ground that "notice to past purchasers presents practical difficulties [because it] is not clear to whom the notice would go or precisely what it would say." Sanborn Mfg. Co. v. Campbell-Hausfeld/Scott Fetzer Co., 828 F. Supp. 652, 656 (D. Minn. 1992), aff'd, 997 F.2d 484 (8th Cir. 1993). Similar difficulties exist in this case.

The court rejected the plaintiffs' argument that an injunction was necessary to protect the public:

> Even if the court were to accept the possibility that the safety of consumers could be endangered through continued use of the dishwashers, a mere possibility of irreparable injury would not meet plaintiffs' heavy burden on a preliminary injunction.

Id. at *20 (citing Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 849 (9th Cir. 1985)). Thus, Punnett I, Sanborn, and Churchill Village address, and reject, injunctions similar to that which plaintiff seeks here.

The only authority plaintiff provides for his extraordinary contention that courts can and should order warnings on a preliminary basis is a single 1982 case from the federal district court in Maryland.[5] Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co., 544 F. Supp. 1104 (D. Md. 1982), aff'd without op., 742 F.2d 1449 (4th Cir. 1984). In Nissan, plaintiff originally sought, and was denied, an injunction prohibiting spray painting operations at the defendant's shipyard. After amending its complaint to add new claims based on damage caused by smoke from

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[5] Plaintiff also relies on an unreported stipulation in Blakely v. Chevron USA, Inc., No. 962107 (S.F. Super. Ct. Aug. 5, 1994), which has no authoritative weight. In Blakely, the parties *stipulated* to the sending of a notice in a July 13, 1994 stipulation, which was merely filed with the court. The court in no way ordered the notice, and neither signed nor entered the stipulation. Plaintiffs' submission does include an order dated August 5, 1994, but this order does not even mention any notice requirement; instead, it requires defendant to preserve and identify engine components.

the vessels in the shipyard, Nissan obtained a temporary restraining order to require the shipyard to "promptly notify all vessels located at its shipyard that the discharge of soot, ash and pollutants from their smokestacks might cause harm to vehicles located on adjoining property, and that such vessels might then be held responsible for any damage caused through discharge." Id. at 1107. The TRO in Nissan involved a much narrower and more limited warning than is sought here. The warning was to be issued to a very limited group of third parties; significantly, those third parties were the entities alleged to have *caused* the harm at issue. Moreover, final disposition of Nissan shows that the TRO was improvidently granted and the order was ultimately dissolved. After a full trial, the court determined that those who received the warning (the ships) were, in fact, *not* liable for damage from the discharge emitted. Id. at 1114. The court held that the defendant shipyard was similarly *not* liable for damage caused by the discharge, and dissolved the TRO. Id. at 1114-20, 1122. The court recognized the potential harm that could arise from the TRO, holding that "the utility of [the shipyard's] conduct outweighs the gravity of the occasional harm which [the plaintiff] has sustained." Id. at 1118. Fortunately, the potential damages from shutting down or deviating from normal operations as a result of the TRO appear to have been reduced because, as found by the court, ship owners apparently ignored the notice. Id. 1115.

Far from demonstrating that this Court should act preliminarily, Nissan shows the unwarranted dangers presented where a court goes against the great weight of the authority, even in issuing a far more narrow injunction than requested here, and grants the extraordinary preliminary relief of the type sought here.

In this case, plaintiff seeks a declaration by this Court, before trial, that would prejudge the core issue of whether there is an emergency hazard. As set forth more fully above in Section II.D., there is more than ample evidence that no emergency hazard exists. Neither plaintiff nor his counsel nor even plaintiff's medical expert, Dr. Anderson, has acted in a manner consistent with the emergency they now profess. Furthermore, Grace's industrial hygiene expert, Dr. Morton Corn (who has inspected the houses of putative class members), agrees that "vermiculite attic insulation material in houses presents no immediate public health hazard or emergency to persons who may reside in the homes or in the area immediately outside the homes." Corn Dec. ¶ 27. Dr. Richard J. Lee, an expert in microscopy and materials characterization, examined the laboratory analysis of air samples taken in each of the seven homes of putative class members and concluded that there "were no amphibole [i.e., tremolite] asbestos fibers of any size observed in the analysis." Lee Dec. ¶ 18. ZAI does not pose an emergency hazard that must be acted upon immediately and it would be improper for this core issue to be prejudiced at this time.

Plaintiff's evidence is simply insufficient to permit the extraordinary remedy he seeks. Indeed, as in Punnett I, "[t]he risk . . . suggested [by the] plaintiff class [is too] uncertain" to support an injunction. 621 F.2d at 588. At best, plaintiff can show only that there is a dispute on this fundamental issue. Washington law is clear that under such circumstances an injunction is improper. Isthmian S.S. Co. v. National Marine Eng'rs Beneficial Ass'n, 41 Wn.2d 106, 117 (1952) (injunction improper where there are issues of material fact); Tyler Pipe, 96 Wn.2d at 793 (trial court must not "adjudicate the ultimate rights in the lawsuit"); Kucera v. Department of Transp., 140 Wn.2d 200, 209 (2000).

Courts that have considered injunctions like that sought here have uniformly rejected them. This Court should do the same. The injunction sought here asks this Court to prejudge the case and should be rejected on that basis. In addition, it fails to meet any of the requirements under Washington law for the issuance of an injunction and is inappropriate as a matter of law.

2. Mandatory Injunctions Like the One Sought Here Are Disfavored Under the Law and Plaintiff Cannot Demonstrate Legal Entitlement.

Plaintiff's motion does not seek merely to restrain defendants in order to preserve the status quo. Instead, plaintiff seeks to compel an affirmative act. Such an injunction is mandatory, not prohibitory, and inherently seeks a *change*, not a preservation, of the status quo. State ex rel. Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 535 (1940) (TRO requiring defendant to increase its prices improperly "changed the status"). See also Stanley v. University of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting Martin v. International Olympic Comm., 740 F.2d 670, 674-75 (9th Cir. 1984)) (mandatory preliminary injunction "goes well beyond maintaining the status quo *pendente lite*"); Doe v. Tenet, 99 F. Supp. 2d 1284, 1294 (W.D. Wash. 2000) (injunction requiring defendant to perform an affirmative act it was not currently performing is a mandatory injunction).

Such mandatory injunctions are rarely granted. They are disfavored and subject to heightened scrutiny. Indeed, the court in Pay Less reversed a TRO *because* it was mandatory. 2 Wn.2d at 532. Similarly, in Lanham v. Wenatchee Canal Co., 48 Wash. 337, 339 (1908), the court reversed a mandatory preliminary injunction that had required defendant to deliver water to the plaintiff's land. The court stated that

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"[i]f a mandatory injunction may issue at all before final hearing, *it is only where the plaintiff's right to relief is clear and certain.*" Id. (emphasis added).

As in Washington, mandatory injunctions are also "particularly disfavored" under federal law, and are denied "'unless the facts and law *clearly favor the moving party.*'" Stanley, 13 F.3d at 1320 (emphasis added) (citations omitted). Further, "'mandatory injunctions . . . are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" Anderson v. United States, 612 F.2d 1112, 1115 (9th Cir. 1979) (quoting Clune v. Publishers' Ass'n of New York City, 214 F. Supp. 520, 531 (S.D.N.Y. 1963), aff'd per curiam, 314 F.2d 343 (2d Cir. 1963)). Therefore, "courts should be extremely cautious" about issuing a preliminary mandatory injunction. Committee of Cent. Am. Refugees v. Immigration & Naturalization Serv., 795 F.2d 1434, 1441 (9th Cir. 1986) (citation omitted), op. amended, 807 F.2d 769 (9th Cir. 1987).

Plaintiff cannot meet the heavy burden he faces to obtain the unprecedented mandatory injunction he seeks here. If authorized at all, an injunction can only be used to preserve the status quo and to prevent loss of rights before trial. Tyler Pipe, 96 Wn.2d at 795-96. Even a run-of-the-mill prohibitory injunction is an extraordinary equitable remedy that "will not issue in a doubtful case." Isthmian, 41 Wn.2d at 117. To demonstrate entitlement to even a prohibitory injunction, the moving party must meet three prerequisites: (1) "'a clear legal or equitable right'"; (2) "'a well-grounded fear of immediate invasion of that right'"; and (3) "'actual and substantial injury'" as a result of the invasion. Tyler Pipe, 96 Wn.2d at 792 (quoting Port of Seattle v. International Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 319 (1958)).

In addition, the moving party bears the burden of establishing that equitable factors, including the public interest, weigh in favor of granting the injunction. Kucera, 140 Wn.2d at 209. The moving party *must* establish *each* of the Tyler Pipe factors and the support of equitable considerations; failure to meet any one of them requires denial of the injunction. Kucera, 140 Wn.2d at 210.

a) Plaintiff Cannot Establish a Clear Legal or Equitable Right.

Plaintiff cannot meet the first requirement of the Tyler Pipe test: there is no "clear legal or equitable right" here. To establish this element, plaintiff must show a "likelihood of that party ultimately prevailing on the merits." Tyler Pipe, 96 Wn.2d at 793. An injunction "'will not issue in a doubtful case.'" Id. (quoting Isthmian, 41 Wn.2d at 117). In particular, an injunction *cannot* be issued where the evidence conflicts on material issues of fact. Isthmian, 41 Wn.2d at 117-18. Further, in assessing the likelihood of success, the court must not "adjudicate the ultimate rights in the case"—which is precisely what plaintiff is asking the court to do here. Kucera, 140 Wn.2d at 216.

As set forth more fully above at pages 5-10 and 15, the issue of whether ZAI presents a hazard to occupants is a material issue of fact that is contested in this case. An injunction cannot issue under Washington law in the face of Grace's evidence that ZAI poses no hazard. Moreover, plaintiff's statutory claims cannot, as a matter of law, entitle plaintiff to an injunction. Plaintiff's Complaint alleges claims under the CPA and WPLA. Neither affords a likelihood of prevailing on a claim for injunctive relief.

Although RCW 19.86.090 authorizes injunctive relief for successful claims under the CPA, plaintiff cannot avail himself of the provision here, because (a) the terms of the CPA's injunction provision, and the CPA's inapplicability to claims for personal injury, foreclose the injunction sought here, and (b) plaintiff cannot establish the requisite element of causation.

The injunction sought by plaintiff is not permitted by the CPA. Injunctive relief is applicable only "to enjoin further violations" of the Act. RCW 19.86.090. Plaintiff's Complaint asserts only damage to *property* caused by purported misrepresentations regarding ZAI. By its very nature, this purported harm (if any) occurred at the time the product was purchased and installed in the buildings now owned by plaintiff. See Plaza 600 Corp. v. W.R. Grace & Co., No. C89-1562D, 1991 WL 539568, at *2 (W.D. Wash. June 19, 1991) (alleged harm in asbestos property damage case occurred upon installation of the product). The "unfair and deceptive" conduct alleged to have caused this harm is purported deception in the marketing and labeling of the product. It is only during this process that a property owner could have relied on a purported misrepresentation that caused damage to his or her property. However, Grace stopped manufacturing ZAI in 1984—over 15 years ago. It is no longer labeling, packaging, or marketing the product, and thus there are no future sales and no possibility of any "further violations." There is simply no conduct that may be enjoined.

Furthermore, no claim based on an ongoing duty can be brought under the CPA in this case. First, claims for personal injuries are not cognizable under the CPA. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 318 (1993); Stevens v. Hyde Athletic Indus., Inc., 54 Wn. App. 366, 370 (1989). More

fundamentally, however, there is no CPA duty to consumers that extends beyond the initial sale of a product. Johnston v. Beneficial Management Corp. of Am., 85 Wn.2d 637, 640 (1975), modified by Salois v. Mutual of Omaha, 90 Wn.2d 355 (1978). Post-sale duties can be applied under the CPA only in circumstances involving an ongoing relationship or promise—such as the sale of an insurance policy. Salois. Indeed, a federal court in Washington has expressly held that the CPA did not create an ongoing duty upon Grace to warn of the dangers of an asbestos product. Plaza 600, 1991 WL.539568, at *4.

In addition, as discussed at more length in Grace's briefing (and its forthcoming oral argument) on its pending summary judgment motion, plaintiff cannot establish causation, which is a required element of a CPA claim. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785 (1986) (among five elements required for a CPA claim is a causal link between plaintiff's damages and an alleged unfair and deceptive act). To establish causation where the claim is based on an alleged false or misleading representation, proof is required that the plaintiff relied on the alleged misrepresentation. Nuttall v. Dowell, 31 Wn. App. 98, 111 (1982). As the summary judgment materials demonstrate, there is a failure of such proof here. Plaintiff's discovery responses and deposition show that he has never purchased ZAI, never received any communications regarding the product, and does not even know who purchased the insulation installed in his properties or when it was purchased. Accordingly, plaintiff never relied on any representation or misrepresentation made by defendants and therefore has not suffered any injury to his property proximately caused by any deceptive act allegedly committed by defendants.

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Nor is injunctive relief available under the WPLA. The WPLA provides in relevant part that a "'[p]roduct liability claim' includes any claim or action brought for harm," RCW 7.72.010(4), with "harm" defined as "any *damages* recognized by the courts of this state," RCW 7.72.010(6) (emphasis added). The WPLA contains no provision permitting a claim for injunctive relief, and nothing in the case law interpreting it suggests that such a claim is cognizable. Thus, because the WPLA preempts all prior causes of action[6] and the right to injunctive relief is conspicuously absent from the WPLA, as a matter of law, plaintiff and the putative class have no right to an injunction pursuant to the WPLA.[7]

b) Plaintiff Has Failed to Demonstrate a Well-Grounded Fear of Invasion.

Despite plaintiff's claims to the contrary, there is no dire emergency or imminent threat to the public which will be exacerbated by awaiting a proper trial on the merits on whether a harm actually exists. Plaintiff himself has taken no immediate action with respect to the majority of his properties to inspect or notify residents of an alleged hazard. (See Factual Background at p. 8.) Moreover, the EPA's studies of vermiculite products indicate that the presence of trace amounts of asbestos poses no significant risk to consumers. Similarly, plaintiff's own medical expert, who is

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[6] Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 855 (1989) (WPLA's definition of "product liability claim" "modifies 'previous existing applicable law' by displacing common law causes of action.").

[7] There is likewise no authority supporting the proposition that injunctive relief was available under pre-WPLA common law.

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responsible for Wisconsin's occupational and environmental health programs, testified that he has taken no "proactive" measures in his state because he is awaiting the outcome of federal studies, and admits that the issue does not pose an "acute emergency." Anderson Deposition, pp. 38, 128:7-129:13, 144:2. Plaintiff's counsel have long known of the issues that they now raise as an "emergency," yet have taken no action until now. (See Factual Background at pp. 9-10.) Finally, there has already been widespread media attention focused on the issue of asbestos and vermiculite and, as discussed in Section III.B., numerous governmental agencies are engaged in ongoing and long-standing efforts to address the very issues raised by plaintiff's motion.

In short, there is nothing to suggest that there is anything urgent or imminent that requires an immediate and premature warning about an alleged hazard that has yet to be proved.

c) Plaintiff Has Failed to Establish Actual and Substantial Injury.

Plaintiff also cannot establish "actual and substantial injury," as required by the third element of Tyler Pipe. As discussed above, scientific evidence shows that there is *no* existing hazard. (See Factual Background.) At best, the declarations submitted by plaintiff show only that there is a dispute regarding this crucial issue. This is patently insufficient to demonstrate entitlement to a mandatory injunction.

An injunction cannot issue where the alleged harm is speculative and unproven:

> An injunction is an extraordinary equitable remedy designed to prevent serious harm[,] . . . not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury.

Tyler Pipe, 96 Wn.2d at 796. To establish that the harm is not speculative, the plaintiff is required to prove causation and the lack of an adequate remedy at law. Kucera, 140 Wn.2d at 224.

The existence of a dispute on the central question of whether ZAI actually causes harm places this case squarely within the holding of Kucera, where an injunction was found improper. Id. at 216-17. In Kucera, the Washington Supreme Court reversed the trial court's grant of a preliminary injunction enjoining the operation of a new state ferry at speeds alleged to damage plaintiff's shoreline property. The trial court had premised its injunction on a finding of the state's "total failure" to follow the minimal requirements of state environmental laws in deploying the vessel, reasoning that no further proof of harm was required. The Washington Supreme Court reversed, criticizing the trial court for failure, among other things, to require a showing of causation of actual and substantial injury. Id. at 224. On the question of causation, the court noted circumstances quite similar to those existing here:

> *[B]oth parties vigorously dispute whether the operation of the Chinook actually causes harm* to the environment. Were we to hold [state environmental law] does or does not apply to the State's actions here, our decision "would be the equivalent of a decision on the merits, a task for which this court is ill suited."

Id. at 216-17 (emphasis added) (citation omitted). The court went on to note that if operation of the vessel did not "significantly and adversely impact[ ] the environment," then "there is clearly no threatened harm to enjoin." Id. at 219. Because there had been no showing of such causation, the injunction was held

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improper. Id. at 224. The same result is required here, where this central issue is disputed.

In addition, plaintiff's motion for preliminary injunction fails to demonstrate that he lacks adequate alternative remedies. See id. at 210-12 (injunction inappropriate where property owners had adequate remedy for damages). If, as plaintiff asserts, his property has been harmed by ZAI, he can seek damages.

Any alleged harm to property has already occurred, Plaza 600 Corp., 1991 WL 539568, so an injunction is wholly improper.

d) Equitable Factors Do Not Support an Injunction.

Finally, even if plaintiff were able to establish each of the Tyler Pipe elements, he still cannot demonstrate that equitable factors support an injunction here. An injunction will not issue "when the harm it will do to a defendant is disproportionate to the damage caused a plaintiff by the action he asks be enjoined." Agronic Corp. of Am. v. DeBough, 21 Wn. App. 459, 464 (1978).

Plaintiff cannot establish to any degree of certainty anything more than a highly speculative (if not nonexistent) harm. Conversely, the premature declaration of a hazard would cause Grace irreparable harm. See Churchill Village, 2000 U.S. Dist. LEXIS 7505 at *30; Sandborn Mfg., 997 F.2d at 490. Even though ZAI is no longer manufactured or sold, the consumer confusion that would result from the warning sought by plaintiff would adversely affect Grace's sales of *other* insulation or construction products. In addition, the issuance of an unfounded injunction would irreparably harm defendants' reputation and good will. Further, a premature declaration of a hazard before trial would irreparably impair the objectivity of

prospective jurors and prejudice defendants' rights in this litigation. These harms are inherently incapable of compensation by monetary damages.

As discussed above, ZAI does not pose a hazard. If an injunction were granted, and after trial or after full consideration by the numerous administrative agencies addressing the issue it were determined that there is not a hazard to property owners, the unfounded public concern that could be caused by such a warning could not be effectively countered. Indeed, the court in Punnett I rejected an injunction to require a warning under just these circumstances. 621 F.2d at 587-88 (injunction denied where warning of radiation hazard could bring unnecessary public anxiety that outweighed uncertain risk of mutagenic birth defects).

The potential for such harm has been recognized by governmental agencies whose functions involve providing warnings. The EPA, for example, has experienced problems with its early statements regarding asbestos in schools. Indeed, it has concluded that changes in its messages on that subject as its scientific knowledge developed have led to public confusion. Price Aff., p. 21. Similarly, the Chairman of the CPSC has noted the drawbacks of "jumping to conclusions about an alleged risk," comparing the panic resulting from a premature warning to that arising from "shouting fire in a crowded theater." Price Aff., pp. 21-22. As a result, the EPA and other governmental agencies now apply principles derived from the scientific field of risk communication, to ensure that necessary messages are properly targeted and crafted to inform, rather than to alarm. Price Aff., pp. 21-22; Supplemental Price Affidavit dated October 5, 2000 ("Supp. Price Aff.") (Ex. 6 to Oct. 6 Treppiedi Dec.).

Premature warning could foster unwarranted consumer concerns that would not be in the public interest. The potential for such consumer worry—or even panic—is

particularly strong here, where plaintiff seeks the issuance of the warning under the auspices of this Court. Such a warning might imply to consumers that there had been a judicial finding of a hazard after full consideration of the merits. Here, as in Punnett I, the existence of any hazard remains a contested issue, while the harm that could be caused by an incorrect warning far exceeds the possibility of any alleged harm caused by awaiting more definitive scientific findings.

B. THIS COURT SHOULD DENY PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF BECAUSE THE SUBJECT MATTER OF PLAINTIFF'S CLAIM IS PROPERLY COMMITTED TO THE PRIMARY JURISDICTION OF GOVERNMENTAL AGENCIES

Federal, state, and local administrative agencies are engaged in ongoing efforts to address precisely the issue raised by plaintiff's motion. The hazard determination plaintiff asks this Court to make, the drafting and distribution of the warnings, the consumer information and safety instructions plaintiff asks this Court to fashion, and the communication and response plans he has asked this Court to devise all fall squarely within the expertise of the EPA and the other federal and state agencies that have been and are studying ZAI. According to plaintiff's own hazard notification expert, those agencies are actively considering a hazard notification and response plan for ZAI. Accordingly, under the long-standing doctrine of primary jurisdiction, this Court should defer to the expertise of those agencies. These agencies have extensive experience in determining and addressing hazards related to asbestos and products that contain asbestos, as well as considerable resources available both to study and to take appropriate action. These agencies are better equipped to make the scientific determinations necessary to answer the central question posed in this case: whether ZAI presents a health hazard to occupants of buildings in which it has been installed.

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Agencies involved include the EPA, OSHA, the CPSC, and the local Washington state air quality control authorities.

Where, as here, a lawsuit involves complex issues that are also under consideration by an administrative agency with experience in the matter at hand, courts often defer to agency expertise. See, e.g., United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956) (describing doctrine of primary jurisdiction, one purpose of which is to obtain the benefit of "the expert and specialized knowledge" of the agency); Far East Conference v. United States, 342 U.S. 570, 574 (1952) (deference to agency appropriate "in cases raising issues of fact not within the conventional experience of judges"). Where a lawsuit involves complex issues that are also under consideration by an administrative agency with experience in the matter at hand, courts often defer to agency expertise. Washington courts have recognized the doctrine of primary jurisdiction and have deferred to agency proceedings under such circumstances. See Schmidt v. Old Union Stockyards Co., 58 Wn.2d 478, 484 (1961) (primary jurisdiction applies where legal claim "'requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body'") (quoting Western Pac., 352 U.S. at 64).

In a case similar to this one, the trial court deferred to an ongoing administrative process engaged in determining the scope of an alleged hazard and the need for a public information process based on its determinations. Punnett v. United States, 602 F. Supp. 530 (E.D. Pa. 1984) ("Punnett II"). The trial court had previously denied a preliminary injunction seeking a warning, which was upheld on appeal; on remand, the trial court dismissed the action for plaintiff's failure to exhaust administrative remedies. The court's decision was based on the pendency of

investigations that were being conducted by the Defense Nuclear Agency ("DNA"). The court noted that the DNA had undertaken "an extensive program developed to research" the very hazard about which plaintiff had sought a warning. Id. at 532. Furthermore, the agency was engaged in an ongoing effort to disseminate information, and was "developing a record as to what should be contained in the warning plaintiffs seek" through distribution of the results of its studies. Id. Thus, it was "distributing facts, although it may not be distributing conclusions from these facts as plaintiffs want." Id. Similarly, in this case, federal regulatory agencies (i.e., EPA, OSHA, ATSDR and CPSC) are all evaluating the vermiculite issue and are disseminating information and reports of their activities.[8]

In In re "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928, 932 (E.D.N.Y. 1979), the court granted a stay of litigation concerning plaintiff's request that defendants' herbicide be banned, because the EPA was independently considering the

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[8] Punnett II discusses a related case, Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), which permitted military personnel subjected to nuclear tests to bring a claim against the Army under the Administrative Procedures Act for failing to act upon their request for a medical warning. Jaffee is not apposite here, however, because it did not involve preliminary relief. Indeed, the very next year the Third Circuit was directly faced with a request for preliminary relief seeking a warning regarding the same alleged harm, and upheld its denial. Punnett I, supra. Furthermore, Jaffee arose under the APA, *after* plaintiffs had unsuccessfully sought relief from the appropriate agency; plaintiff in this case has not even attempted to do so.

need for a ban. Other courts have likewise applied the doctrine of primary jurisdiction to matters involving the special expertise of the EPA. See, e.g., Kennecott Copper Corp. v. Costle, 572 F.2d 1349 (9th Cir. 1978); Montgomery Envtl. Coalition Citizens Coordinating Comm. v. Washington Suburban Sanitary Comm'n, 607 F.2d 378 (D.C. Cir. 1979).

These cases demonstrate that where, as here, administrative expertise and resources can and are being brought to bear upon an issue that is central to a litigation proceeding, the court cannot—and should not—interfere with administrative agencies' review. As set forth more fully in the affidavit of Dr. Bertram Price, the EPA and CPSC are currently evaluating whether the very relief requested by plaintiff in this case is appropriate. These agencies have been conducting extensive comprehensive evaluations with respect to asbestos exposures, and have employed the expertise of independent scientists and scientific research organizations to determine the relationship between health risk and human exposure to asbestos. Price Aff., p. 2. The agencies are better equipped not only to determine whether a hazard exists, but also to determine whether a warning is warranted and, if so, to create and disseminate an appropriate warning in a manner that can avoid unnecessary consumer confusion and most effectively reach those in need of it. Price Aff. § 4.2; Supp. Price Aff. They are already communicating frequently and in depth with the public concerning potential exposure to asbestos in buildings and to vermiculite insulation with trace amounts of asbestos in residences. Price Aff., p. 2; Brown Aff. ¶ 13.

Plaintiff's own medical expert, Dr. Henry A. Anderson, a purported expert on risk communication, among other things, testified that it would be improper for his

state agency to issue a warning regarding vermiculite attic insulation without waiting for a coordinated effort with federal authorities:

> We've also learned over the years that for something like this a single message, a unified message . . . is far more effective than a single state or a single county or a single program taking action on their own, where this is a long term issue, it's not a short term issue . . .

Anderson Dep., pp. 126:21-127:2. While plaintiff contends that this Court should act preliminarily to send out an immediate warning, Dr. Anderson believes it is inappropriate for his state agency to take any such preliminary action. Indeed, Dr. Anderson is awaiting the lead of federal agencies studying the issue:

> For something that is a nationwide issue of which we [the state agency] don't have the knowledge on the full extent of the information or where it is or how people can know what the issue is, we're dependent upon the federal government to generate that.

Anderson Dep., p. 130:1-9. Dr. Anderson is "confident that the information is being generated" by the federal agencies. Id. According to Dr. Anderson, state brochures or websites are "not sufficient to the get word out. That's why it has to be national. That's why the lead and the announcements will come via ATSDR and EPA." See Anderson Dep., pp. 142:24-143:3.

For more than 30 years, federal government agencies have been closely involved in regulating, studying, and addressing potential hazards posed by asbestos-containing products. This area is covered by a host of regulatory schemes, addressing areas ranging from workplace safety to environmental protection to consumer protection. A full description of the many federal agencies involved in this issue, their historical activities, and their ongoing studies and actions is contained in the Price

Affidavit. Recent and ongoing activities of these agencies with respect to vermiculite products in particular include the following:

- Since 1977, CPSC has investigated the safety of asbestos-containing products, and has the authority to ban any that it deems unsafe. CPSC began investigating vermiculite insulation with trace amounts of asbestos in the early 1980s. This study has not yielded grounds to ban, or even to regulate, such products. Price Aff. § 2.3.
- The EPA has also studied potential vermiculite exposure since the early 1980s. It has made a comprehensive effort to obtain data, including contracting with several private scientific consultants. The EPA has also been actively involved in exposure and risk assessment studies. In 1985, it published an exposure assessment that concluded, with respect to exposure from consumer installation of products like ZAI, that "[o]nce in place, vermiculite attic insulation would probably not lead to subsequent consumer exposure." Price Aff., p. 8.
- The EPA conducted a health assessment for vermiculite in 1991. In February 1999, it received a risk assessment report whose methodology EPA is currently considering applying to potential household exposures. Price Aff., pp. 8-9.
- This year, the EPA conducted a study to assess consumer risk associated with vermiculite in horticultural products, concluding that "the likelihood of the asbestos becoming airborne, during routine use of these [horticultural] products, indicated that this potential exposure poses a minimal health risk to consumers." Price Aff., p. 9.

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- The EPA's web page includes a "Q&A regarding vermiculite attic insulation," which concludes: "[D]ue to the physical characteristics of vermiculite, there's a low potential the material is getting into the air. If the insulation is not exposed to the home environment - for example, it's sealed behind wallboards and floorboards or is isolated in the attic which is vented outside - the best advice would be to leave it alone." (Ex. 17 to Oct. 6 Treppiedi Dec.)
- The EPA is engaged in current and ongoing testing of the exposures to homeowners from vermiculite attic insulation products and the appropriate maintenance of those products. See EPA "Q&A Libby Asbestos Site, EPA Region 8" (Ex. 19 to Oct. 6 Treppiedi Dec.).

In addition, numerous agencies with authority over this issue exist at the state and local level. The Department of Labor and Industries has jurisdiction over and has issued regulations governing workers who come into contact with asbestos products. See, e.g., Chap. 49.26 RCW; WAC 296-62-077; WAC 296-65-001 et seq. Washington has also enacted a statute governing indoor air quality in government buildings, Chap. 70.162 RCW, which tasks the Department of Labor and Industries with recommending policies and regulations to strengthen indoor air quality and to provide educational and informational materials on the subject. The Department of WISHA Services of the Department of Labor and Industries has issued a Regional Directive on indoor air quality that addresses guidelines for evaluating indoor air quality issues and workplace hazards. Finally, Washington's Clean Air Act, Chap. 70.94 RCW, establishes local air pollution control agencies that have authority to conduct research into air pollution hazards and to collect and disseminate information

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to the public. RCW 70.94.141. Local agencies, including the Spokane County Air Pollution Control Authority ("SCAPCA"), acting under the authority granted by the Clean Air Act, have enacted regulations governing asbestos. SCAPCA has expressly stated its interest in issues posed by airborne asbestos and its impact on public health. SCAPCA Reg. I, Art. IX.

These comprehensive efforts, by experienced agencies with jurisdiction over the issue and significant experience in evaluating the potential for harm associated with asbestos products, provide a more appropriate forum than is available in the courts. In fact, according to plaintiff's own medical expert, a coordinated national effort by these agencies is necessary to address the issue effectively. Anderson Dep., p. 143:2-3. Indeed, according to plaintiff's counsel, the issues here pose questions of "public health." Sept. 21 Trans., p. 24:1-5. Accordingly, they should be resolved by agencies experienced in and responsible for public health, not by the courts.

C. PLAINTIFF'S REQUEST FOR NOTICE UNDER CIVIL RULE 23(d)(2) SHOULD BE DENIED.

Apparently recognizing the weakness of his arguments based on the preliminary injunction standard, plaintiff tries to convert the procedural notice available under CR 23(d)(2) into a basis for obtaining relief on the merits. The court should reject plaintiff's creative, but unfounded, attempt to do so. CR 23(d)(2) is a purely *procedural* rule that has not been, and cannot be, transformed into an entitlement to substantive relief. The rule is intended to protect the procedural rights of class members during the course of litigation, not to protect them from the conduct that allegedly gave rise to it.

The general purpose of CR 23(d) is to provide a notice mechanism for classes certified under provisions of CR 23 that do not automatically require a notice. 7B Charles Alan Wright et al., Federal Practice and Procedure ("Wright") §§ 1791, 1793, at 298 (West 1986). As stated by the Advisory Committee Note to the corresponding (and identical) federal rule, subsection 23(d)(2) "is concerned with the fair and efficient conduct of the action." It authorizes the court to provide notice to absent class members of developments in the litigation (e.g., "various steps being taken in the action and other matters"). Wright § 1791, at 286. The vast majority of notices, therefore, are designed to ensure that class members are aware of their procedural rights (such as the right to opt in or out), or to enhance the court's management of class actions (such as to aid it in determining numerosity or to notify class members of developments in the case). See, e.g., Dore v. Kinnear, 79 Wn.2d 755, 766-67 (1971) (cited by plaintiff) ("Manifestly, this notice is for the benefit of the members of the class to allow them to object to their inclusion in the case or to be bound by the judgment in the event their rights may in any way be adversely affected.").[9]

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[9] Class notice is generally issued only after certification. See Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073, 1079 (9th Cir. 1975). Under the rare circumstances in which pre-certification notice is appropriate, the purpose is to preserve the *procedural* rights of class members, not to address the merits, and any notice must be carefully calibrated to avoid prejudicing a defendant. Tylka v. Gerber Prods. Co., 182 F.R.D. 573, 579 (N.D. Ill. 1998).

Nothing in CR 23 or in the case law construing it permits a court to utilize a notice as a remedy on the merits as plaintiff seeks to do here. Indeed, this is expressly prohibited: there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). The Court continued:

> Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

Id. at 178.

Plaintiff has materially distorted the meanings of cases in which notices have issued under CR 23(d)(2). Notices involving purported misconduct by defendants in class actions have generally issued in two types of situations: (1) where liability has actually been determined and the class is notified of this result or (2) where defendant has engaged in unauthorized contact with class members or some other procedural violation. Not one case permits a pre-trial notice addressing the purported "misconduct" upon which the underlying claims are premised. That is what must be addressed at trial, and, as Eisen mandates, no procedural device may be utilized to deprive a defendant of that fundamental right.

Each of the cases cited by plaintiff is consistent with this principle. In Nagy v. Jostens, Inc., 91 F.R.D. 431, 432 (D. Minn. 1981), the court ordered corrective notice after the defendant violated a court order prohibiting certain communications with putative class members. The required notice served solely to protect the procedural

rights of class members and to remedy misconduct *during* the litigation, not the conduct giving rise to the litigation. Similarly, both Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985), and Weight Watchers of Philadelphia v. Weight Watchers Int'l, 53 F.R.D. 647 (E.D.N.Y. 1971), supplemental op., 55 F.R.D. 50 (E.D.N.Y 1971), required notices to remedy improper contact by defendants with class members *during the litigation*. Both pertain to the court's power to manage the procedural aspects of class actions; neither even remotely suggests that CR 23(d)(2) can be used to provide substantive relief on plaintiff's underlying claims.[10]

Barahona-Gomez v. Reno, 167 F.3d 1228, 1236 (9th Cir. 1999), cited by plaintiff, likewise fails to support his request for a warning on the merits. There, the court granted a preliminary injunction prohibiting further deportation of certain immigrants and certified a class of immigrants whose applications had been denied under the law that was challenged in the litigation. The court did not utilize Fed. R. Civ. P. 23(d)(2) as a substitute for a preliminary injunction as plaintiff seeks to do here. Instead, it applied both Fed. R. Civ. P. 65 and Fed. R. Civ. P. 23 as they were intended—the former to provide substantive prohibitory relief pendente lite and the latter to provide notice of the litigation to the certified class. Further, the notice did

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[10] Plaintiff's final "authority" is an unpublished reporter's transcript of a trial court hearing. To the extent this document provides any guidance at all, it merely establishes the same principle as plaintiff's other cases—that courts may use CR 23(d)(2) to address *procedural* violations, not to remedy past conduct giving rise to the litigation.

not prejudge the merits (as plaintiff seeks in this case) by stating that the class members' applications had actually been wrongly denied. That issue was left for trial.

In addition to seeking his substantive remedy on the merits in the guise of a class notice, plaintiff also seeks to impose the cost on defendants, based solely on his contention that plaintiff's alleged damage has been caused by defendants' purported misconduct. Plaintiff's brief at 26, 29. Plaintiff's proposition represents yet another attempted leap over the requirement of trial on the merits, and is directly contrary to established class action law.

The Supreme Court has expressly rejected this notion. In Eisen, it held that the lower court's cost-shifting order based on its finding of the moving party's probability of success on the merits "contravene[d] the Rule" and improperly decided the merits. 417 U.S. at 177. Alleged wrongdoing underlying the merits of a claim is patently insufficient to shift the cost of notice. Id.; see also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 363 (1978) ("A bare allegation of wrongdoing . . . is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff's case.").

D. IF AN INJUNCTION IS ORDERED, A SUBSTANTIAL BOND WOULD BE REQUIRED.

Finally, this Court should reject plaintiff's request that it shift to Grace *all* the costs of the requested injunction—including the damages if an injunction were issued and later found to be improper—by waiving the bond requirement. Both CR 65 and Washington's injunction statute, RCW 7.40.080, require a bond before an injunction may be issued. CR 65(c) sets forth the rule in mandatory terms:

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> *[N]o* restraining order or preliminary injunction shall issue *except upon the giving of security by the applicant*, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(Emphasis added.) Similarly, Washington's statute sets forth the general rule as follows:

> No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, . . . to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order. . . .

RCW 7.40.080.

Plaintiff has not cited a *single* Washington case to support his argument for waiver of the bond. Indeed, Washington courts have consistently construed the bond requirement quite strictly. Even an injunction that has actually been issued is invalid if a bond is not filed. See, e.g., Irwin v. Estes, 77 Wn.2d 285, 286-87 (1969) (without a bond, there is no valid injunction); Swiss Baco Skyline Logging Co. v. Haliewicz, 14 Wn. App. 343, 345 (1975) (bond is a condition to obtaining preliminary injunctive relief).

In 1994, the Legislature enacted an amendment to the injunction statute that permits waiver of the bond requirement "in situations in which a person's health or life would be jeopardized." RCW 7.40.080. However, in the six years since this amendment was enacted *no* reported Washington decision has applied this exception to waive an injunction bond in its entirety, as plaintiff seeks here. In light of Washington's long history of strictly applying the bond requirement, it is clear that only the most exceptional circumstances could support a waiver. Such circumstances

have yet to be found by any Washington court, and certainly do not exist here—where the evidence does not even support the existence of any health hazard.[11]

Furthermore, defendants would be highly prejudiced if no bond, or a nominal bond, were required. Grace would suffer substantial harm, in lost sales and in damage to its reputation and good will by the improper issuance of an injunction. The declaration of a hazard that plaintiff seeks would prejudice defendants on a material issue for trial. In short, issuance of the injunction plaintiff seeks would irreparably harm Grace.

Accordingly, it is important that plaintiff be required to post a very substantial bond in an amount to be determined by this Court. As discussed above, the warning plaintiff requests is likely to confuse the public. The manner of its delivery and its lack of targeting would lead most consumers to recall few of its specifics, and to confuse the particular product at issue with other insulation products. The most likely

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[11] Even under the more lenient federal standard upon which plaintiff attempts to rely, waiver would be inappropriate. Federal judges have discretion to waive an injunction bond, but have generally done so only where plaintiff "would effectively [be] den[ied] access to judicial review." California ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1319, 1325 (9th Cir.), amended, 775 F.2d 998 (9th Cir. 1985). Such circumstances have been found only in exigent circumstances, such as in public interest litigation or where the plaintiff is indigent. This case, in contrast, is a private suit for damages brought by a successful landlord who is represented by six different law firms. Plaintiff can hardly be said to be "denied access to judicial review" and he has not even attempted to claim indigency.

outcome would be a generalized unease with Grace's products overall, and lost sales on insulation or other building products that contain no vermiculite or asbestos materials. If the court grants plaintiff's request, Grace would also incur substantial costs in disseminating the requested notice and handling the consumer questions that will inevitably arise from it. In addition, Grace's reputation and good will would be irreparably harmed.

IV. CONCLUSION

Plaintiff cannot meet the heavy burden required to obtain the mandatory injunction he seeks. No emergency exists. The requested injunction is unprecedented and improperly asks this Court to prejudge the core issue on the merits of this case. Plaintiff's two legal theories suffer from fundamental weaknesses, and plaintiff cannot establish the scientific facts he must prove in order to prevail. Furthermore, no harm would attend denial of an injunction, because this very issue has already received widespread publicity in the print and electronic media and is currently being addressed by several different governmental agencies with considerable experience and expertise in potential asbestos hazards. Finally, the premature and conclusory warning sought here would be harmful to the public interest by engendering consumer confusion. The public interest, as well as plaintiff's concerns, is better served by permitting the numerous state and federal agencies currently studying this issue to make determinations, based on broader experience and scientific resources that are not available to this Court, regarding whether a hazard exists and, if so, whether and in what form the public should be warned.

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